

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY S. FORD,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
ROXINA RUMLEY, et al.,	:	
Respondents.	:	No. 03-4236

MEMORANDUM AND ORDER

J. M. KELLY, J.

JULY , 2004

Presently before the Court are the Report and Recommendation of United States Magistrate Judge Diane M. Welsh recommending that the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254 by pro se Petitioner Jeffrey S. Ford ("Petitioner"), who is incarcerated at the State Correctional Institution in Chester, Pennsylvania, be denied and dismissed, and Petitioner's objections thereto. For the following reasons, this Court **OVERRULES** Petitioner's objections, **APPROVES** and **ADOPTS** Magistrate Judge Welsh's Report and Recommendation, and **DENIES** Petitioner's habeas petition.

I. BACKGROUND

Petitioner was convicted of murder in the first degree and possession of an instrument of crime following a bench trial before the Honorable Michael R. Stiles of the Court of Common Pleas of Philadelphia. See Commonwealth v. Ford, No. 1418 Phila. 1990, slip op. at 1 (Pa. Super. Ct., May 21, 1991). Petitioner was sentenced to life in prison for the murder conviction and,

following the denial of post-verdict motions, he was sentenced to a concurrent term of two-and-a-half to five years in prison for the weapon offense. See id.

Represented by new counsel, Petitioner filed a direct appeal to the Superior Court of Pennsylvania, and on May 21, 1991, the Superior Court found Petitioner's claims without merit and affirmed the judgment of sentence. See id. at 10. The Supreme Court of Pennsylvania denied Petitioner's request for allowance of appeal on January 14, 1992. See Commonwealth v. Ford, 602 A.2d 856 (Pa. 1992) (table).

On December 28, 1996, Petitioner filed a pro se petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541-46. See Commonwealth v. Ford, No. 2387 EDA 1999, slip op. at 2 (Pa. Super. Ct., Apr. 2, 2002). Following the appointment of counsel, counsel filed an amended PCRA petition which was subsequently denied by the PCRA Court. See id. at 2-3. On April 2, 2002, the Superior Court affirmed the PCRA Court's denial of the petition. See id. at 6. The Supreme Court of Pennsylvania denied allowance of appeal on July 1, 2003. See Commonwealth v. Ford, 828 A.2d 349 (Pa. 2003) (table).

Petitioner filed his Petition for Writ of Habeas Corpus with this Court on August 27, 2003.¹ On September 5, 2003, this Court

¹ Previously, on July 28, 2003, this Court ordered the Clerk of Court to furnish Petitioner with current forms for

referred the matter to Magistrate Judge Welsh for a Report and Recommendation.

Petitioner alleged in his habeas petition before this Court the following grounds for relief: (1) the prosecution failed to disclose to Petitioner evidence favorable to Petitioner's defense; (2) ineffective assistance of appellate counsel in failing to raise the issue of trial counsel's ineffective assistance in "failing to insure a proper jury waiver colloquy;" (3) ineffective assistance of trial counsel "for failing to introduce the [victim's] propensity for violence;" and (4) ineffective assistance of appellate counsel in failing to raise the issue of trial counsel's ineffective assistance "for producing a character witness who had been convicted of a violent crime before the [trial court] and for failing to object to the Commonwealth calling police officers as negative character witnesses." (See Hab. Pet., ¶¶ 12(A)-(D).)

The Commonwealth ("Respondent") filed a response arguing that Petitioner's first claim is procedurally defaulted and, in any event, without merit. Respondent also argued that Petitioner's second, third and fourth claims are not cognizable and without merit. (See Resp. to Hab. Pet. at 12-27.)

Magistrate Judge Welsh filed a Report and Recommendation

filing a petition pursuant to 28 U.S.C. § 2254 and further ordered Petitioner to complete and return those forms to the Clerk of Court within thirty days to avoid dismissal of the action.

recommending that Petitioner's habeas petition be denied and dismissed. Preliminarily, Magistrate Judge Welsh determined that Petitioner's second, third and fourth claims, to the extent that they allege errors by the state court during post-conviction proceedings, are inappropriate grounds for federal habeas relief. (See Report and Recommendation at 4.) Magistrate Judge Welsh then determined that Petitioner's first claim was procedurally defaulted and, further, that Petitioner failed to meet the applicable standards for excuse of the underlying default such that this Court could consider the merits of that defaulted claim. (See id. at 9.) Finally, Magistrate Judge Welsh reviewed each of the second, third and fourth claims on the merits, and determined that Petitioner failed to meet his burden for relief on each of these claims. (See id. at 12-21.)

In accordance with this Court's grant of an extension of time, Petitioner filed his objections to Magistrate Judge Welsh's Report and Recommendation. We address Petitioner's objections below.

II. DISCUSSION

This Court reviews de novo those portions of the Magistrate Judge's Report and Recommendation to which specific objections have been made. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

Petitioner's objections to Magistrate Judge Welsh's Report

and Recommendation essentially recite the very arguments set forth in his habeas petition, and include the following arguments, that: (1) the prosecution's failure to disclose evidence favorable to Petitioner's defense is not procedurally defaulted; (2) appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffective assistance in "failing to insure a proper jury waiver colloquy;" (3) trial counsel was ineffective "for failure to introduce the [victim's] propensity for violence;" and (4) appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness "for producing a character witness who had been convicted of a violent crime before the [trial court] and for failing to object to the Commonwealth calling police officers as negative character witnesses." (See Pet.'s Obj., ¶¶ (A)-(D) (unpaginated).) While we find that Magistrate Judge Welsh's well-reasoned Report and Recommendation provides a thorough analysis of each of Petitioner's alleged grounds for habeas relief, we nevertheless address de novo each of Petitioner's objections to the Report and Recommendation below.

A. Claim of Prosecution's Failure to Disclose Evidence

Petitioner objects to Magistrate Judge Welsh's determination that his claim regarding the prosecution's alleged failure to disclose to Petitioner evidence that was favorable to his defense is procedurally defaulted. Specifically, Petitioner alleges as his ground for relief that "medical records which included exculpatory evidence of the victim's health conditions prior to and during his hospital stay included pre-existing factors that contributed to the actual demise. Thus breaking the direct chain of causation attributed to the petitioner." (Pet.'s Obj., ¶ II(A) (unpaginated).)

By Petitioner's own admission, this ground for relief was never presented to the state courts for review. Petitioner's stated reason for not having presented this ground in the state courts is as follows: "Petitioned state court for subpoena of medical records never answered, court granted investigator did no work, hired two investigators kept my families money no work." (Hab. Pet., ¶ 13.)

A state prisoner must first exhaust the remedies available to him in the state courts before obtaining federal habeas review of his conviction. 28 U.S.C. § 2254(b)(1)(A). State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process. O'Sullivan v.

Boerckel, 526 U.S. 838, 845 (1999). Requiring exhaustion of state remedies "addresses federalism and comity concerns by affording the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." Coady v. Vaughn, 251 F.3d 480, 488 (3d Cir. 2001) (internal quotations omitted). The exhaustion rule "should be strictly adhered to because it expresses respect for our dual judicial system." Caswell v. Ryan, 953 F.2d 853, 857 (3d Cir. 1992). The burden rests with the habeas petitioner to prove exhaustion of all available state remedies. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997).

In this case, it appears that Petitioner has failed to present his first claim to the Pennsylvania state courts on direct appeal or during post-conviction proceedings. See, e.g., Commonwealth v. Ford, No. 1418 Phila. 1990, slip op. at 1 (direct appeal); Commonwealth v. Ford, No. 2387 EDA 1999, slip op. at 3-4 (PCRA appeal). Indeed, Petitioner acknowledges his failure to exhaust this first claim on his habeas petition. (See Hab. Pet., ¶ 13.) Thus, the Pennsylvania courts did not have one full opportunity to resolve Petitioner's first claim during one complete round of the State's established appellate review process. See O'Sullivan, 526 U.S. at 844-45. The failure to fairly present federal claims in state court, where no state remedy remains available, "bars the consideration of those claims in federal court by means of habeas corpus because they have been

procedurally defaulted." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002).

The United States Supreme Court has explained the exceptions to the procedural default rule:

In all cases in which a state prisoner has defaulted his federal claims in state court[,] . . . federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). To satisfy the cause and prejudice requirement, "a petitioner must demonstrate some objective factor external to the defense that prevented compliance with the state's procedural requirements." Id. at 753. The "cause" alleged must be "something that cannot fairly be attributed to" the petitioner. Id.

In the alternative, a petitioner must show that failure to review the federal habeas claim will result in a "miscarriage of justice." Werts v. Vaughn, 228 F.3d 178, 193 (3d Cir. 2000). "Generally, this exception will apply only in extraordinary cases, i.e., where a constitutional violation has probably resulted in the conviction of one who is actually innocent." Id. (internal quotations omitted). To show a fundamental miscarriage of justice, a petitioner must demonstrate that he is actually innocent of the crime by presenting new evidence of innocence. Keller v. Larkins, 251 F.3d 408, 415-16 (3d Cir. 2001).

Here, Petitioner has procedurally defaulted on his first ground for habeas relief. Petitioner no longer has a remedy by which the state courts could consider this claim, it appearing that he is barred from raising it in a second PCRA petition. See 42 Pa. Cons. Stat. § 9545(b)(1). Specifically, Petitioner's judgment of conviction became final in 1992 and his PCRA petition would now be time-barred under the PCRA's one-year time limit on filing petitions. See id. Thus, to be excused from the procedural default bar to review of the merits of this claim, Petitioner must demonstrate that he meets the "cause and prejudice" or "fundamental miscarriage of justice" standard set forth above.

We find that Petitioner has failed to meet either burden. In his habeas petition, Petitioner claims that the state court did not did not grant a "subpoena for medical records" and that the "court granted investigator did no work." (Hab. Pet., ¶ 13.) We find, however, that neither of these alleged reasons prevented Petitioner from presenting this claim to the state courts, as demonstrated by the fact that Petitioner was able to present this very claim to this Court in his habeas petition without the same medical records Petitioner now claims to have required to present this claim in the first instance.

Petitioner objects to the Report and Recommendation, alleging that he does meet the "cause and prejudice" or "fundamental miscarriage" exceptions to the procedural default

rule by reciting similar reasons already asserted in the habeas petition. Specifically, Petitioner states that his request for "a court sealed subpoena to comply with hospital records request" was denied by "President PCRA Judge Bonavittacola." (Pet.'s Obj., ¶ II(A) (unpaginated).) To the extent that Petitioner is referring to infirmities in the state collateral proceedings, those proceedings do not enter into the habeas calculation. Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998). "Claims attacking a state court's application of post-conviction procedures do not state a basis for a federal claim under 28 U.S.C. § 2254." Terry v. Gillis, 93 F. Supp. 2d 603, 614 (E.D. Pa. 2000). Thus, to the extent that Petitioner is objecting to the Report and Recommendation based on events that occurred in the state collateral proceedings, we do not address these allegations on habeas review.

Offering no other reason for why he should be excused from the procedural default bar from review, we find that Petitioner additionally fails to meet the "fundamental miscarriage of justice" criteria for review. Accordingly, this Court independently finds that Petitioner's first ground for habeas relief is procedurally defaulted and barred from review by this Court.

B. Claims for Ineffectiveness of Counsel

Petitioner's remaining second, third and fourth grounds for relief involve claims for ineffectiveness of counsel.² Those grounds will be addressed below in turn, to the extent that Petitioner's claims do not allege ineffective assistance of PCRA counsel, as such claims are not cognizable in a federal habeas petition. See 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). Thus, we discuss only the merits of Petitioner's claims for ineffectiveness of counsel at trial and direct appeal. Petitioner is entitled to habeas relief if he can establish that counsel's ineffectiveness resulted in some harm or prejudice, the familiar standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), which standard has been explained in detail in Magistrate Judge Welsh's Report and Recommendation and will not be repeated here. (See Report and Recommendation at 12-14.) We address each claim in turn.

² In this case, Petitioner has invoked one complete round of the State's established appellate review process with regard to his remaining second, third and fourth grounds for habeas relief. (See Hab. Pet. ¶¶ 12(B)-(D).) See also, Commonwealth v. Ford, No. 1418 Phila. 1990, slip op. (direct appeal); Commonwealth v. Ford, No. 2387 EDA 1999, slip op. (PCRA appeal).

1. Jury Waiver Colloquy

Petitioner's objection to the Report and Recommendation as to his second ground for relief provides: "This claim is cognizable for the soul [sic] reason if no other that, although an extensive colloquy was rendered by the trial judge . . . it was absent the most important ingredient which was any explanation of an aggravating circumstance, which the death penalty charge in and of itself was hinged on for the waiver to be given." (Pet.'s Obj., ¶ II(B) (unpaginated).)

The United States Court of Appeals for the Third Circuit has previously addressed this issue in an case with facts analogous to this, where a habeas petitioner argued that waiver of a federal constitutional right to a jury trial, when induced by the prosecution's pledge not to pursue the death penalty, violates due process. Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998). The Third Circuit disagreed with that petitioner, finding that the applicable standard remains whether the waiver represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See id.

Petitioner's objection does not allege that the trial court's jury waiver colloquy was an involuntary or unknowing choice. Petitioner also does not allege that the Commonwealth threatened prosecution on a charge not justified by the evidence, or threatened a more onerous penalty than indicated by the facts

for the purpose of obtaining an unfair advantage in negotiating with Petitioner's counsel. See id. Indeed, Petitioner acknowledged during the colloquy that he was voluntarily and intelligently waiving his right to a jury trial. (See Resp. to Hab. Pet., Ex. C, Tr. 12/13/88 at 4-14.) Moreover, Petitioner concedes, in his objection to the Report and Recommendation, that the trial judge rendered an "extensive colloquy." Thus, Petitioner has failed to demonstrate that trial counsel's assistance was ineffective by failing to insure a proper jury waiver colloquy, or that appellate counsel was ineffective for failing to raise a meritless claim.

2. Victim's Alleged Propensity for Violence

The nature of Petitioner's specific objection to the Magistrate Judge's finding on his third ground for habeas relief is not entirely clear. Petitioner states, in relevant part: "a petitioner is entitled to habeas relief only if it can be established that the constitutional error had 'substantial and injurious effect or influence in determining the jury's verdict.'" (Pet.'s Obj., ¶ II(C) (unpaginated).) We construe Petitioner's objection as alleging that trial counsel was ineffective for failing to introduce the victim's propensity for violence. (See Hab. Pet., ¶12(C).)

Under Pennsylvania law, "[a] victim's propensity for

violence is admissible to corroborate the defendant's knowledge of the victim's violent character and show that the defendant acted in self-defense or to prove that the victim was the aggressor." Commonwealth v. Amos, 284 A.2d 748 (Pa. 1971). The Superior Court, on direct appeal of Petitioner's criminal conviction, determined that Petitioner "did not produce any evidence establishing self-defense or that the victim was the aggressor." See Commonwealth v. Ford, No. 1418 Phila. 1990, slip op. at 8 ("Throughout the trial, appellant asserted that there was a struggle and that the victim accidentally shot himself. Appellant denied any and all responsibility for the shooting.") The Superior Court also determined that even if the victim's criminal record existed, it would not have been admissible. Id. (citing Commonwealth v. Rivers, 557 A.2d 5 (Pa. Super. Ct. 1989)). Since it is not the province of a federal habeas court to reexamine state-court determinations on state law, this Court must defer to the state court regarding its conclusions on state law issues. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Because evidence of the victim's propensity for violence would not have been admissible under Pennsylvania law, trial counsel's failure to introduce the victim's propensity for violence did not constitute ineffective assistance of trial counsel.

3. Character Witnesses

The nature of Petitioner's objection to the Magistrate Judge's finding on his fourth ground for habeas relief is also unclear, except that the title of the objection seems to allege ineffectiveness of trial counsel "for producing a character witness who had been convicted of a violent crime before the [trial court] and for failing to object to the Commonwealth calling police officers as negative character witnesses." (See Pet.'s Obj., ¶ II(D) (unpaginated).)

According to the Superior Court's findings:

At trial the defense offered five character witnesses. A friend, Ms. Nurkuhert, and the defendant's mother, Dorothy Ford took the witness stand. George Coverdale and Gerri Brooks, and David Ford testified via stipulations. Judge Stiles immediately informed the parties that Coverdale had previously appeared before him, but, that he would not consider that fact in weighing Coverdale's testimony.

See Commonwealth v. Ford, No. 2387 EDA 1999, slip op. at 5 (adopting opinion of PCRA Court at 6). Preliminarily, the Superior Court noted that a trial judge, acting as fact-finder, is presumed capable of disregarding improper or prejudicial evidence. Id. Further, the Superior Court noted that, under Pennsylvania law, "the testimony of the Commonwealth's rebuttal witnesses regarding evidence of the defendant's negative character" was "relevant and admissible." Id. As previously discussed, this Court must defer to the state court regarding its conclusions on the state law issue of admissibility of evidence

under Pennsylvania law. Because the challenged testimony was admissible under Pennsylvania law, we cannot find that trial counsel was ineffective for failing to object to the production of such character witnesses.

III. CONCLUSION

For the foregoing reasons, this Court **OVERRULES** Petitioner's objections, and **APPROVES** and **ADOPTS** Magistrate Judge Welsh's Report and Recommendation as supplemented by this Memorandum. Accordingly, Petitioner's Petition for Writ of Habeas Corpus is **DENIED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEFFREY S. FORD,	:	CIVIL ACTION
Petitioner,	:	
	:	
v.	:	
	:	
ROXINA RUMLEY, et al.,	:	
Respondents.	:	No. 03-4236

O R D E R

AND NOW, this day of July, 2004, upon careful and independent consideration of the Petition for Writ of Habeas Corpus filed by pro se Petitioner Jeffrey S. Ford ("Petitioner") (Doc. No. 3), United States Magistrate Judge Diane M. Welsh's Report and Recommendation (Doc. No. 12), and Petitioner's Objections thereto (Doc. No. 15), **IT IS ORDERED** that:

1. Petitioner's Objections to Magistrate Judge Welsh's Report and Recommendation are **OVERRULED**.
2. Magistrate Judge Welsh's Report and Recommendation is **APPROVED** and **ADOPTED** as supplemented by the foregoing memorandum.
3. Petitioner's Petition for Writ of Habeas Corpus is **DENIED**.
4. Because Petitioner has failed to make a substantial showing of the denial of a constitutional right, there is no basis for the issuance of a certificate of appealability.

BY THE COURT:

JAMES MCGIRR KELLY, J.